

IN THE
Supreme Court of the United States
OCTOBER TERM, 1942.

No. _____

STROBEL STEEL CONSTRUCTION COMPANY,
a corporation,
Petitioner and Appellant below,

vs.

STATE HIGHWAY COMMISSIONER OF THE STATE OF
NEW JERSEY,
Respondent and Appellee below.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

(Italics ours, except where otherwise stated.)

I.

Opinions of the Courts Below.

The opinion of the New Jersey Court of Errors and Appeals sustaining the dismissal of the common law action for extras under the contract is reported in 120 N. J. L. 298; 198 Atlantic 774.

The opinion of the New Jersey Supreme Court denying the application for the writ of certiorari to review the action of the State Highway Commissioner in refusing to allow petitioner's claim for extras is reported in 125 N. J. L. 622; 18 Atl. (2) 28.

The opinion of the New Jersey Court of Errors and Appeals affirming the action of the Supreme Court in dismissing the application for certiorari in the New Jersey Supreme Court, and sustaining said Court in its dismissal (on demurrer) of the alternative writ of *mandamus* directed to the State Highway Commissioner is reported in 128 N. J. L. 379; 25 Atl. (2) 903.

II.

Jurisdiction.

A concise statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question, has been given under Heading II in the petition, and in the interest of brevity will not be repeated in the brief.

III.

Statement of the Case.

A concise statement of the case containing all that is material to the consideration of the questions presented, has been given under Heading I of the petition, and in the interest of brevity will not be repeated in the brief.

IV.

Specification of Errors.

The specification of errors is substantially the same as the reasons for the allowance of the writ as set forth under Heading IV of the petition, and in the interest of brevity will not be repeated in the brief.

V.

Argument.

Summary of the Argument.

Point 1—The insistence by all of the Courts of the State of New Jersey that the State Highway Commission and its successor, the State Highway Commissioner, are immune from suit without the consent of the State of New Jersey is a deprivation of petitioner's rights guaranteed to it under the Fourteenth Amendment of the Constitution of the United States of America, since the Statutes creating the State Highway Commission and the office of State Highway Commissioner authorized the Commission and Commissioner to enter into contracts in the performance of their work *as independent contractors* or in the name of the State of New Jersey, and since under said statutes the powers conferred upon the Commission and Commissioner are to be liberally construed, which naturally implies a liberal construction of correlative liability to suit.

POINT I.

The insistence by all of the Courts of the State of New Jersey that the State Highway Commission and its successor, the State Highway Commissioner, are immune from suit without the consent of the State of New Jersey is a deprivation of petitioner's rights guaranteed to it under the Fourteenth Amendments of the Constitution of the United States of America, since the statutes creating the State Highway Commission and the office of State Highway Commissioner authorized the Commission and Commissioner to enter into contracts in the performance of their work as independent contractors or in the name of the State of New Jersey, and since under said statutes the powers conferred upon the Commission and Commissioner are to be liberally construed, which naturally implies a liberal construction of correlative liability to suit.

The crux of the question involved herein is whether in view of the specific powers conferred under the Statutes of New Jersey upon the State Highway Commission and the State Highway Commissioner, such State body and State official are immune from suit without the consent of the State of New Jersey. The merits of petitioner's claim for extras amounting to over three-quarters of a million dollars are not now under consideration. The issue is a confined one, and depends solely upon the legislative intent and the language of the statutes creating the State Highway Commission and creating the office of State Highway Commissioner in the light of the recent decisions of this Court recognizing the disfavor into which the age worn theory of sovereign immunity has fallen.

When the contract between petitioner and the State Highway Commission involved in this case was executed, Chapter 319 of the Pamphlet Laws of 1927 of the State of New Jersey, as amended by Chapter 221, Pamphlet Laws of New Jersey, 1929, governed the transaction.

The State Highway Commission was authorized by Section 106, Chapter 319 of P. L. 1927 as follows:

“The State Highway Commission shall take charge of all work on State highways and maintain the same in good order. All work of improvement, betterment, reconstruction, or resurfacing shall be done in accordance with plans and specifications prepared by the State Highway Department. *All work of maintenance, repair and extraordinary repair shall be done at the expense of the State and may be done either as an independent contractor or employer or through contracts made in the name of the State of New Jersey.*”

By Chapter 221, Public Laws of 1929, the Commission was authorized by Section 111 as follows:

“In addition to, and not in limitation of, its general powers, the State Highway Commission shall have power—

“a. To determine and adopt rules, regulations and specifications and to enter into contract covering all matters and things incident to the acquisition, improvement, betterment, construction, reconstruction, maintenance and repair of State highways.

“b. To execute and perform *as an independent contractor* or through contracts made in the name of the State of New Jersey, all manner of work incident to the maintenance and repair of State highways.”

The same Act defines said highway system as including, among other items, "All bridges" (Chapter 319, P. L. 1927, page 730).

Extraordinary repairs are defined in said Act (Page 731) as:

"Extensive or entire replacement, with the same or a different kind of material, of one or more of the component factors of the original improvement of a road, which may become necessary because of wear, disintegration or other failure."

By Subdivision E of Section III of said law of the State of New Jersey, the State Highway Commission was authorized:

"To do and perform all acts now required by law to be done and performed by the State Commissioner of Public Roads, the State Highway Commission and the Highway Commission. *These powers are to be liberally construed*". (Page 726.)

The contract in question was by its express terms and provisions executed by virtue of the authority vesting with said Commission by reason of Chapter 319, Public Laws of New Jersey, 1927.

The State Highway Commission, also by express legislative authority (same act), did determine and adopt rules, regulations, and specifications. The specifications forming a part of the contract between the parties contained the following:

"In any case where the contractor deems extra compensation is due him for work or materials not clearly covered in the contract, or not ordered by the engineer as an extra, as defined herein, the contrac-

tor shall notify the engineer of his intention to make claim for such extra compensation before he begins the work on which he bases the claim. If such notification is not given, or the engineer is not afforded proper facilities by the contractor for keeping strict account of actual cost, then the contractor hereby agrees to waive the claim for such extra compensation. Such notice by the contractor, and the fact that the engineer has kept account of the cost as aforesaid, shall not in any way be construed as proving the validity of the claim. *The claim must be passed upon by the Commission. In case the claim is found to be just, it shall be allowed and paid as an extra as provided herein for extra work*". (R. 113.)

The provisions of the foregoing statutes, as well as the statute under which the State Highway Commission was originally created (P. L. 1917, Chap. 15, p. 35), considered as a whole, indicate that it was the intent of the legislature to set up an independent body authorizing it to perform the work and to act in its own name, making contracts in its own name, and having complete control over payment, supplying it with a fund from which to make the payments, not made up solely of appropriations from year to year but from receipts from certain sources in the future ^{such} ~~and~~ as gasoline taxes and ^{motor} ~~motor~~ vehicle registration fees (P. L. 1927, Chap. 331, p. 778). It is precisely the same situation as if an independent corporation with the usual attributes had been set up by the state.

The recent trend of the law has been that in order for a governmental body to successfully maintain the defense of immunity, such right must inhere from express language used in the Act creating the body. On the contrary, liabil-

ity to suit may properly be implied from the general language in the Statute and the legislative purpose behind the Statute. Taking these two theories and applying them to the case at bar, we find that *nowhere in the Statute creating the State Highway Commission is there an express immunity from suit granted*. On the contrary, the fact that the State Highway Commission may perform its work as *an independent contractor* (which it did in the instant case) creates the irresistible conclusion that the State Legislature must have intended that the State Highway Commission was subject to suit.

It is interesting to note that in the New Jersey Supreme Court decision denying certiorari on the ground of immunity, the Court said:

“The Legislature could have set up a tribunal akin to the Federal Court of Claims, but in the absence of such action, no Court may subject the sovereign to suit.”

In the light of the precise language in the Statute enabling the Commission to engage in its work as an independent contractor, it is submitted that the foregoing quotation begs the question.

Immunity from suit of the various governmental bodies created by Congress has fallen into disfavor. The most recent decisions in which the question has arisen without exception recognize that each governmental body is subject to suit—notwithstanding there is usually an absence of any provision in the legislation stating that such body may sue or be sued. The general purposes behind the legislation has been inquired into, and universally it has been held that

the best purposes of the nation would be served by recognizing liability to suit. It was so held in *Federal Land Bank v. Priddy*, 295 U. S. 295, *Keifer vs. Reconstruction Finance Corp.*, 306 U. S. 381, *Federal Housing Administration vs. Burr*, 309 U. S. 242, and *Reconstruction Finance Corp. vs. Menihan*, 312 U. S. 81.

It is no answer to petitioner's contentions to say that the failure of the State of New Jersey to create a Court of Claims is fatal to petitioner's relief. Petitioner is guaranteed certain rights under the Federal Constitution, and if the action of the New Jersey Courts by clinging to the age worn doctrine of sovereign immunity as applied to governmental bodies is destructive of such rights, petitioner is entitled to relief in the Federal Courts.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the New Jersey Court of Errors and Appeals.

Dated: July 25, 1942.

LIONEL P. KRISTELLER,
SAUL J. ZUCKER,
Attorneys for and of Counsel
with Petitioner.

